United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

74-1348

B

Pages

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CASE NO. 74-1348

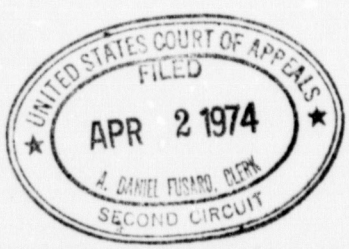
WARNER BROS., INC. and COLUMBIA
PICTURES INDUSTRIES, INC.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA
Respondents,

NATIONAL ASSOCIATION OF INDEPENDENT
TELEVISION PRODUCERS AND DISTRIBUTORS, et al.
Intervenors.

BRIEF FOR INTERVENOR NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION PRODUCERS AND DISTRIBUTORS



KATRINA RENOUF

Renouf, McKenna & Polivy
1532 Sixteenth Street, N. W.
Washington, D. C. 20036

2

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CASE NO. 74-1348

WARNER BROS., INC. and COLUMBIA
PICTURES INDUSTRIES, INC.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA
Respondents,

NATIONAL ASSOCIATION OF INDEPENDENT
TELEVISION PRODUCERS AND DISTRIBUTORS, et al.
Intervenors.

BRIEF FOR INTERVENOR NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION PRODUCERS AND DISTRIBUTORS

ARGUMENT

THE PETITION FOR REVIEW IS FRIVOLOUS AND THE RELIEF REQUESTED SHOULD BE DENIED.

The threshold question before this Court is whether any action at all with respect to the existing Access Rule could lawfully be taken once the Commission had decided that insufficient time had passed to develop any factual

basis on which to reach a judgment as to the Rule's success or failure.[1/] The wholly imaginary question which Warner Bros., Inc. et al. (Warners) would have this Court decide is whether the Access Rule should be wholly revoked, as they ask, or only substantially revoked, as it was.[2/] Because it thus neatly sidesteps the only necessary issue in these cases, Warners' brief could achieve only one conceivable end, the end to which it appears in fact to be directed: sufficiently confusing this Court that it begs the entire issue and affirms the Commission out of a despair misconceived as judicial deference to agency discretion.

Since the brief thus makes no legal argument,[3/] it warrants no further legal refutation from opposing parties than is contained in the foregoing statement and will receive none from NAITPD. However, simple conscience and respect for the judicial process demand some comment on the multiple improprieties whose commission was apparently deemed essential to support an otherwise too obviously frivolous argument. Those improprieties included misrepresentation and/or distortion of record

---

1/ A fuller statement of questions presented appears at pages 1-2 of NAITPD's brief in Case No. 74-1168. However, absent satisfactory resolution of this threshold question, which neither the Commission's Report and Order nor the petitioners' brief in this case has even addressed, it remains also the dispositive question.

2/ Report and Order, F.C.C. 74-80, released February 6, 1974, 39 Fed. Reg. 5585 (1974), J.A. 51. The Report and Order will hereafter be cited by paragraph number.

3/ Neither the petitioners' brief nor that of concurring intervenor MCA even contains a Table of Authorities. While MCA also incorporates by reference the entire Warner filing, its own primary presentation is a reproduction of its petition for reconsideration filed with the Commission -- manifestly the forum which should (and did, both here and in the original Prime Time Access proceeding) consider arguments of the sort here offered on appeal.

facts, the objectives of the Access Rule, this Court's holding in Mt. Mansfield,[4/] and the Commission's conclusions in the challenged Report and Order; attribution to the record of facts not in evidence; and scurrilous and prejudicial innuendoes concerning the character, motivation and bona fides of virtually all opposing parties.

The several arguments presented in Warners' brief need not be reached at all because their inadmissibility as arguments before this Court is established by the falsity of their entire foundation, which is laid in the first 18 pages of the Brief, comprising the "Statement of Issues Presented for Review" and several following topics which apparently serve in lieu of a Statement of the Case.

The first question presented attributes four findings of fact to the Report and Order, of which two were not made and two are in direct opposition to findings which were made. The question in its entirety reads: "whether the Federal Communications Commission (F. C. C.) acted arbitrarily and capriciously and contrary to the public interest by continuing the prime time access rule (PTAR), despite its own factual findings that the rule over the past three years had defeated its own goals by decreasing innovative and diversified programming, by failing to decrease network dominance, and by creating additional negative effects not present before the rule?" (Brief, page 1). The first false assertion is that the Commission found "that the rule...had defeated its own goals..." The Commission found not once but over and over again that it was too soon to reevaluate the Rule (See, e.g., Report and Order, paragraphs 89-91, 92, 94, 95, 98). The only error in this finding was that the Commission did not thereupon

---

4/ Mt. Mansfield Television, Inc. v. F. C. C., 442 F. 2d 470 (2d Cir. 1971).

conclude that opponents of the Rule, having thus necessarily failed to carry their designated[5/] "clear and considerable burden" of establishing that the Rule "in actual operation will not serve the public interest," the proceeding would be terminated and reevaluation delayed until facts existed on which any judgment could be based. Needless to say, the falsity of the general statement that the Commission found the Rule to have failed in achieving its objectives is dispositive of the three other specific statements cited essentially as Commission reasons for the general finding. However, each is also additionally false and impermissible in and of itself.

The second false statement if that the Commission found that the Rule had "decreas(ed) innovative and diversified programming." The argument that the programing record under the Rule was unsatisfactory was specifically rejected in the Report and Order because it was premature after only one year;[6/] because any apparently adverse programing consequences were counterbalanced by favourable ones; and because even entertaining judgments in this area would to a great extent involve improper examination of program content. (Report and Order, supra, paragraphs 92-94). The only error related to this finding was that the Commission

---

5/ Notice of Inquiry and Notice of Proposed Rule Making: Operation of and Possible Changes in, the Prime Time Access Rule, 37 F.C.C. 2d 900, 906 (1972). J.A. 1, 6.

6/ The Commission properly viewed the Rule as having had one year, not the three stated in Warners' question, on which to be evaluated since in its first year it was both partially ineffective absent the off-network program ban and riddled with waivers, and its third year performance is only now taking place.

ignored it, substantially revoking the Access Rule because of network programs it liked and access programs it did not.[7/]

7/ And sadly enough, even this wholly impermissible thing (see NAITPD's brief in Case No. 74-1168, Argument II) was done badly in the Report and Order since the Commission wholly failed to consider the fact that access shows must be compared not to the finest networks can promise or have made but to the network shows they replace. Certainly this point was made often enough by those parties who were even willing to undertake specific comparisons (which NAITPD was not, although its comments dealt at length with reasons why comparison was illegal, improper, premature, likely to amount to a self-fulfilling prophecy, and impossible of constructive regulatory response), and the futility of the effort to discredit access shows by comparing them with relevant network offerings is cogently clarified in the separate comments filed by Goodson-Todman Productions, itself a particular target of the major studios throughout the proceeding:

> No one can say with certainty what network material would have been shown in the absence of the rule. What is known is what has been shown by the networks in the same time period prior to the introduction of the rule. The 7:30-8:30 P. M. time period has generally been a more difficult time period for networks to program successfully than time periods later in the evening. The existence of a 'bi-modal' audience at 7:30 P. M., consisting of a mixture of very young and very impressionable viewers as well as older viewers, creates special programming problems. Moreover, this time period experiences lower sets-in-use than all later prime-time periods except 10:30-11:00 P. M., thereby reducing the economic base for financing program production. Despite their financial resources, programming know-how, virtually guaranteed clearances, and best efforts, the three networks have not been outstandingly successful in the 7:30-8:00 P. M. time period in producing shows of generally acclaimed quality (as judged by critical reviews) or popular acceptance (as evidenced by ratings). Nor have particularly innovative programs been telecast by the networks in the 7:30-8:00 P. M. time period. The record for the six seasons preceding the introduction of the rule would seem to support this statement. Among the network programs that were telecast during those six years in the 7:30-8:00 P. M. time period were the following: My Mother the Car, Shindig I, Shindig II, Wild Wild West, Camp Runamuck, Girl From U. N. C. L. E., Monkees, Jericho, Green Hornet, Gilligan's Island Cowboy in Africa, Tarzan, The Avengers, Custer, Garrison's Gorillas, Second 100 Years, Maya, Dating Game, The Ugliest Girl in Town, Mod Squad, Blondie, The Queen and I, Music Scene, and Men From Shiloh. This is the yardstick -- the extended record of network performance in the 7:30-8:00 P. M. time period -- against which syndicated prime-time access programs must be measured, not against idealized promises for the future.
>
> Comments of Goodson-Todman Productions, Pages 7-8.

The third false statement in Warners' first "issue presented" is that the Commission found the Rule to have "fail[ed] to decrease network dominance." The "increased network dominance" argument made before the Commission by all the major studio parties, including Warners, was premised on the assertion that network control over what remained of prime time has strengthened as against advertisers and program suppliers. 8/

8/ A significant omission here was any contention that network control had strengthened against affiliates, which might have been a partial failure of the Rule since it was in part designed to give true freedom to licensees -- at least during access time. (See, e.g. Report and Order: Network Television Broadcasting, 23 F. C. C. 2d 382, 397, reconsideration granted in part and denied in part, 25 F. C. C. 2d 318, affirmed sub nom. Mt. Mansfield Television, Inc. v. F. C. C., 442 F. 2d 470 (2d Cir. 1971); Order on Reconsideration, supra, 25 F. C. C. 2d 318, 329. In fact the record rather graphically demonstrated that the Rule had not only freed licensees during access time but had also strengthened their independence in non-access time, as indicated by the fact that NBC, one of the petitioners for revocation whose request initiated this second rulemaking in as many years, withdrew its opposition to the original Rule at oral argument, adopting instead what it characterized as a "dubitante" position. The stated justification for this change was that the industry had already been irreversibly altered by the Rule:

> It is rather naive, I think, to assume that the rule hasn't changed the industry because it has changed the industry. . . [I]t has become increasingly difficult to evaluate these changes. There seems to be a new [vigour] among producers. Producers are making plans. Syndicators are starting. Audience ratings are up. The affiliates, some of them, have gotten used to the rule. Some in fact like it. . . . We know that if the rule is repealed, clearances may not come forth as readily as they once did. It may be difficult, really hard to program now. You can't create what has been a substantial change in the industry, what some people have called a revolution, and then expect to go back without some kind of agonizing reassessment. It's like a runaway child. You may get the child back, but the experiences the child has had in the outside world has changed his or her perspective. The economic instability that generally exists is another complicating factor. In these circumstances, what has been labelled by some as our dogmatic position of the past has become a dubitante position or, instead of one of certainty, it is one of reflection.
>
> Transcript of oral argument, pages 374-375.

Oddly enough, the only recognition given this governmentally long sought development by the Commission itself was to use the new licensee independence as a reason for denying stay of the present substantial revocation, by citing the fact that Hee-Haw is now run in Washington, D. C. during network prime time where the ABC affiliate preempts a network offering. (J. A. page 182). While one swallow does not make a summer, and one preemption will not save Hee-Haw absent all Saturday, Sunday and hour long access slots, the trend it seems to indicate most assuredly should have saved the Access Rule itself from the headsman's axe.

The Commission not only rejected this contention as wholly "speculative" but found that even if true it would be outweighed by the decrease in network dominance through removal of access programming itself from the network funnel, a result both "definite and readily apparent." Report and Order, supra, paragraph 97. The only error made by the Commission in this connection was effectively to revoke a Rule thus specifically found to be achieving its primary objective.

The fourth false statement in Warners' first question presented is that the Rule was found by the Commission to have "creat[ed] additional negative effects..." This argument was also made to the Commission by all the major studios, who asserted both that the Rule was detrimental to Hollywood film production and employment and resulted in increased use of foreign product, and that the Rule had caused increased commercialization by licensees. As to the first contention, the Commission held it to be in part unsupported by the record; in part contradicted by the record; outside the scope of the Commission's expertise; and beyond the scope of the Commission's jurisdiction. (See Report and Order, paragraphs 98-99). As to the second contention, the Commission declined to credit it since to the extent that it was correct it was counterbalanced by increased access to affiliates for local and regional advertisers (which had been an affirmative goal of the Rule). See Report and Order, supra, paragraph 100.[9/] The only

---

9/ With respect to these matters the cited paragraph states that they "are conflicting but difficult to weigh because they are quite different." Indeed they are, having nothing at all in common save their general subject matter. The Commission's wholly unexplained assumption that they nevertheless had to be compared is consistent with its decisional method throughout the Report and Order, which reflects some irresistible urge toward creating bilateral symmetry with one argument or solution to satisfy those who like the rule and one to match for those who do not. And where, as here, they run out of "matching parts" they simply put an ear on one side of the head and a nose on the other. This fundamental decisional error is treated in NAITPD's brief in Case No. 74-1168, Argument ID.

errors here (other than the general error noted in footnote 9, supra) were that the Commission in fact appears to have acted on the first of these discredited contentions[10/] and that in the case of the second -- increased commercialization by certain licensees -- it ignored the fact that all affiliate programed time shows a higher ad concentration on most stations, a matter now governed only by a self imposed industry code (with which the affiliate commercialization in access time is in full compliance) although well within the power of the Congress or the Commission if they chose to deal with it.

In sum, Warners' first issue presented falls of its own weight because each of the alleged Commission findings, on which its formulation of a legal question depends, was categorically contradicted by the actual Commission finding; held balanced or outweighed by another finding; or simply held not to permit a finding either way. Warners' second issue presented asks whether the Rule, in actual operation, "violates the paramount right of the public to the most diversified and meaningful choice of programs under the First Amendment and the Communications Act because the rule" allegedly does six different things, which will be disposed of in order. First, according to Warners' second issue presented, the Rule, "admittedly foists upon the public less diverse and less innovative programs -- namely a repetitive diet of inexpensive merchandise and game shows and some other old network discards." Presumably the "admitting" was done by the Commission. However the Commission not only made no

---

10/ Revocation of the Rule from 7:00-7:30 was based in part on the fact that such action would "ease the problems of the majors" by allowing their reruns back into access time... Report and Order, supra, paragraph 80.

such finding but also in fact affirmatively found that it is too soon to make a finding at all. Even more fundamental than this direct misrepresentation of the Report and Order, however, is the misrepresentation by implication that the diversity fundamentally sought by the Access Rule was diversity of program content rather than diversity of program source. While diverse ideas were of course the eventually hoped for outcome of a diverse market, a truism which finds its analogue in all pro-competitive government regulations whether they be the antitrust laws or network regulations like these, 11/ this conversion of an antimonopolistic economic regulation into a direct effort to stimulate and/or discourage specific programs, converts a Rule designed to implement First Amendment freedoms into a Rule which destroys them (a defect of analysis which the new rules themselves unfortunately also reflect, as noted in NAITPD's brief in Case No. 74-1168, Argument II).

Finally, with respect to Warners' characterization of what appears in access time -- "inexpensive merchandise and game shows and some other old network discards"--several observations are perhaps in order. As to the "old network discards" in access production, they are all newly produced and produced solely for access time, as opposed to the old network

---

11/ The Report and Order adopting the original Rule discussed this matter in some detail, as noted at pages 7-13 of NAITPD's brief in Case No. 74-1168. Manifestly, as the American Civil Liberties Union notes in its Comments in this proceeding (attached hereto as Appendix A), "There is strong evidence that in the everyday practical relationship between the network and licensee the dangers to access and diversity underscored by the Commission and the Court of Appeals [in Mt. Mansfield, supra] are clearly present. The program originator, producer, director or writer, whose opinions and ideas do not satisfy those who decide -- and control -- network television programming, presently has few places to go. There is no real alternative outlet for his creative expression. With the development of alternate sources of prime time programming, the program creators might have such an alternative and the public might receive fresh and diversified treatment of important public issues." ACLU Comments, page 3.

discards for which Warners wants (and effectively received) access time back. Those "discards" are in fact reruns of shows produced under network supervision and no longer being made, whereas the access time "discards" like Lawrence Welk and Hee-Haw and Let's Make A Deal (which of course was very innovative when it occupied network prime time) are still being produced and sold solely because they attract enormous audiences despite the fact that the first two are neither inexpensive nor game shows. Moreover, the question of whose discard is better than whose was specifically resolved when the Commission adopted the off-network rule to bar reruns of programs from made for network sources and adopted the access rule package (including the Syndication and Financial Interest Rules) to encourage, inter alia, the continued syndicated production for access time use of "old network discards" like Welk and Hee-Haw. See Network Television Broadcasting, supra, 23 F. C. C. 382, 399; Argument IC of NAITPD's brief in Case No. 74-1168. And as to the anti-game show crusade, which the Commission seems to have joined, no one, including the Commission, has ever explained what is the matter with game shows. Indeed the Commission rather clumsily avoids saying that anything is, since it recognizes both the fact that program source, not program type, is here at issue and the fact that such a foray into censorship would, in any event, be illegal, unconstitutional and unworkable. It might, however, have been more reassuring to find the following remarks in the Report and Order than in the Comments of a party:

> B. No Legitimate Program Category Should be Denied Access to Prime-time.
>
> No one category of programs is inherently superior to another, nor does the size of a program budget necessarily determine comparative program quality. There are good dramatic series which stir the emotions and

there are poor dramatic series with thinly drawn characters, transparent and unbelievable plots, or excessive and unmotivated violence. There are good situation comedies which are genuinely funny and there are poor situation comedies which are imitative, strained, in poor taste, and generally unbelievable. There are good "doctor" and good "lawyer" series, and there are poor ones. There are well-produced variety programs and there are poorly-produced variety programs. Similarly, there are good "game" and panel shows, and there are poor ones. It is unfair and misleading to derogate "game shows" as a program form, nor is it necessary to defend the comparative quality of every game and panel show in order to argue in behalf of the quality of some. In a nation where playing and observing games, whether they be bridge, monopoly, football, baseball, or a myriad of other games is so popular, it should not be surprising that television game and panel shows have found widespread viewer acceptance. 12/ Like telecasts of sporting events, well-conceived and well-produced audience participation shows (a program form uniquely developed in broadcasting and performed in no other medium) provide for viewers entertainment which has at least as much claim to broadcast time as still-another detective or police series, still-another doctor series, still-another lawyer series, or still-another adventure series. Indeed, it can be argued that a program like To Tell The Truth, which uses an intriguing game-panel format with minimal prizes, and which presents real people with real stories of achievement, exploration, or adventure, does more to inform and enrich its viewers than any number of programs in fictional story-telling categories. The continued interest of viewers in programs like To Tell The Truth and What's My Line?, with competitively successful broadcast records extending from 15 to 25 years, is unparalleled evidence of public desire for this type of programming. That virtually all regularly scheduled entertainment programming in prime-time on every network affiliated station in the United States should be devoted only to fictional story telling plus a few variety shows, and that access should be denied to programs in other categories, would appear to run counter to clearly expressed public interest.

Comments of Goodson-Todman Productions, pages 8-9.

12/ A particular irony here is that the Commission itself became so thoroughly infected with the American love of athletic game shows that it virtually destroyed the Access Rule to ensure their constant availability from network sources, even during the few minutes a week still left for non-network programs. See new Rules 73.658(k)(2)(i), (ii), (iii) and (iv); see also Arguments IB and IID of NAITPD's brief in Case No. 74-1168.

The second alleged improper effect of the Rule cited in Warners' second issue presented is that it "totally bans during prime time access periods feature motion pictures the public wants." The "total" ban here at issue differs little from the two year ban originally held vital to production of programs designed for the access slot by the Commission and this Court, since it only extends the ban to cover even older movies. In any event, the record herein reflects both that very few stations have shown movies in this time period and that those which did received very poor ratings, hardly a showing that the "public wants" movies in the only 30 minutes of the whole day from which they are presently excluded.

The third alleged improper effect is that the Rule "totally bans during prime time access periods popular independently-produced programs simply because they were once telecast by a network," which of course is also a matter squarely faced and affirmatively found vital to the Access Rule's success in Mt. Mansfield. The only conceivable reason for reasserting it here would be to induce this Court to share the Commission's newly confused notion that the Access Rule is designed to encourage any producer which calls itself an "independent" rather than to encourage the production by any producer except a network itself, of programs for prime time syndication. The Access Rule would encourage Warners as much as anyone else if Warners made access shows, which it is free to do; but so long as it tries to use reruns in access time, its use of the phrase "independent" to characterize itself is inaccurate in context. The Commission's own failure to remember this has been one factor leading to the sorriest aspect of its administration of the Rule -- the grant of wholesale waivers now codified into exemptions. This "independently produced" characterization was relied

on in a number of waivers, including that now on appeal in the District of Columbia Circuit (See Argument II D in NAITPD's brief in Case No. 74-1168) and wholly ignores both the fact that it destroys the Access Rule and the fact that "if certain network programming is of such outstanding character to warrant pre-emption of regularly-scheduled programming, the network should pre-empt its own time rather than the time of its affiliates. If the Commission is going to entertain and grant waivers, however, the sole consideration should. . . be. . . the effect of the waiver on opportunities for access and diversity." ACLU Comments, Appendix A hereto, page 8.

The fourth alleged violation of the public's paramount right of access to diverse program sources is that the Access Rule "burdens the public, particularly children who are heavy viewers during access periods, with a doubling of commercials." First off, the "fact" is false. Even where commercial time is increased, it is in no case "doubled." Secondly, the Commission has noted that stations need not and often do not increase commercial time at all and that in any event access by non-national advertisers to this most crucial of advertising media was a specific goal of the Rule. 13/ And finally, commercialization in access time is no different from any other locally programed time period; is governed by and consistent with the National Association of Broadcasters Code; and is accordingly wholly unaffected by the Access Rule except insofar as that Rule gives local licensees control of their own time, a responsibility whose effectuation is governed by the licensing processes of the Act and not the network regulatory scheme of which the Access Rule is a part. And insofar as the question suggests the

---

13/ It has also long been a goal of the Congress. See, e.g., Activities of Regulatory and Enforcement Agencies Relating to Small Businesses, Select Committee on Small Business, H.R. Rep. No. 2344, 89th Cong., 2d Sess., 1966, which was also of record in this case.

propriety of a different commercial standard for children, two points are in order: announcement of such a standard, which has yet to be made, has nothing to do with the Access Rule; and the fact that access time is a time when many children do watch, also has nothing to do with the Rule itself, since before these modifications required clearance of 7:30, it was solely a network judgment which time to make available.

The fifth and sixth affronts to the public's right of access charged in Warners' second question presented are that the Rule "establishes broad categories of preferred programs which are given special access" and "generally involved the FCC deeply in the program selection process to an extent and scope never before attempted or permitted." With these contentions NAITPD is in full accord but they are not attributes of the Access Rule and therefore do not support revocation of that rule. Rather, they are attributes of the present modifications and are improper, unsupported and unconstitutional for all the reasons given in NAITPD's brief in Case No. 74-1168.[14/]

Warners' third question presented asks:

> Whether PTAR violates the standards of Due Process and Equal Protection by giving free access to repetitive game shows, replicas of other old network programs and inexpensive foreign programs, as well as certain preferred program categories, while totally banning all motion pictures and those independently-created programs which appeared on networks and restricting the presentation of new and diversified programs on networks during access periods?

The specific matters in this question have all been discussed above. The general defect of this question is that it confuses the Access Rule with the presently challenged rules, which are in fact open to dispositive challenge for some of these among other reasons simply because they do what Warners,

---

14/ Indeed, it is for the same reasons that most of the matters raised in Warners' own questions represent improper considerations in the context of the Access Rule.

even in this very question, asks this Court to do: regulate on the basis of program type rather than program source. Once the point of inclusion or exclusion of programs by type has been reached the illegality is unavoidable and does not depend on which programs are included or which excluded. See Argument II D in NAITPD's brief in Case No. 74-1168.

Warners' fourth and final question presented asks:

> Whether the FCC, in a divided opinion, has violated the Administrative Procedure Act by adopting conclusions refuted by its own factual findings, by making inconsistent conclusions, by disregarding the studies of its experts, and by seeking a compromise to satisfy competing private interests and ignoring the public interest?

Aside from two specific points -- that the Commission was, regrettably, not in fact divided; and that the "studies of its experts," equally regrettably, do not exist [15] -- NAITPD essentially agrees that all the cited deficiencies

---

15 / The so-called "Pearce Report" to which Warners is here alluding was a document, prepared largely on the basis of the bitterly challenged (a point which the Report and Order rather overlooks) series of "Joint Appendices" of the major studio parties, which reflects on its face the fact that it is a personal study by a member of the Chairman's staff and that "any views or conclusions in the report are those of the author, and do not, in any way, represent FCC views or conclusions that may be reached in the inquiry." The significance of this disclaimer was underscored by the Commission's refusal to distribute the report to parties during the inquiry, despite formal requests by NAITPD and Westinghouse, and by the fact that it was finally made publicly available by the author only through distribution by a commercial printing house, which offers copies for sale at $22.50.

And as for the "exhaustive study of the industry" (Brief p. 9) by the White House's Office of Telecommunications Policy, two remarks are in order. First, it is unclear why interference by the Executive Branch in the workings of an independent agency constitutes advice from "disinterested experts." Surely the only disinterested expert here is the Commission itself. And second, the cited document was a report on reruns in television broadcasting, with one paragraph thrown in concerning the Access Rule, whose programs this record shows to have a significantly more favourable percentage of new to rerun episodes than all of the network prime time programing to which the OTP study was in fact addressed.

characterize the new rules, although their defects are hardly limited to APA violations. The consequence of these defects, however, is to render unlawful the attempts to alter the Access Rule; they do not in any way affect the propriety of that Rule itself.

The Statement of the Case which follows these questions essentially does little more than compound these initial errors in order to set up the false premise which the body of the brief will seek to destroy. It does do one other thing, however, which NAITPD cannot find the grace to ignore: it attempts to carry its point by destroying the credibility of all other parties through statements which are either themselves direct falsehoods or are designed to lead the Court to draw false factual inferences. First, it is implied that the Access Rule should be revoked because "two of the three television networks, who were the targets of PTAR, are now its ardent champions." (Brief p. 5). This statement is false both in fact and in intent. The two cited networks are ABC and NBC. ABC favoured the original Rule because ABC was at that time too weak to do a full evening schedule and it was thus essentially "helped" by the "harm" to NBC and CBS. To the extent that the network monopoly is itself a good, or at least unavoidable, fact of broadcasting life, the Commission has long sought to ensure that its three voices never became less than that. And as for NBC, it was one of the authors of the present rulemaking, changing its mind on total repeal only because, as noted earlier, it feared licensee rebellion. The fact is that all three networks like the present rules because they are not the Access Rule but the closest thing to revocation which could get seven votes; will keep ABC competitive; will keep NBC's affiliates in line; and will still give all three networks back as much time as they want right now and all of it eventually when they can whip up sufficient numbers of "exempt" programs to fill the whole week.

Warners' next target is Westinghouse, whose bona fides are somehow questioned because it was "the inventor" (Brief p. 13) of the Access Rule, as if that made Westinghouse its prime beneficiary. Actually the Commission, apparently for the opposite reason, also rejected much of what Westinghouse said. Westinghouse, for example, was one of those broadcasters who never increased their commercialization during access periods but when that was noted by the company's President at oral argument, the response of the questioning Commissioner was to the effect that since everyone knows Westinghouse is a good broadcaster, its actions should not be viewed as reflective of the industry. See Transcript of Oral Argument, page 483.

Warners' last target is NAITPD itself, along with most of its individual member companies. (Brief pages 16-17). First, Warners attaches sinister significance to the fact that the present Chairman of the group's Executive Committee is an officer of Goodson-Todman Productions, "whose offices and telephone number NAITPD shares" and whose programs "fill nearly 25% of all access time devoted to syndicated programs."[16/] This is particularly ironic since one year ago, when no one from Goodson-Todman was even on the Executive Committee (whose members were noted in NAITPD's Comments to the Commission), Warners attacked the organization because the Chairman of its Executive Committee (with whom it likewise shared office and phone number) had the misfortune to go bankrupt the week before oral argument. Burt Rosen's fault in Warners' eyes, however, was not that he

---

16/ While Warners' statistic is both disputed and irrelevant it does bring to mind the unmentioned and far more interesting fact that one of the major independent producers for networks (MCA), all by itself programs 34% of all this year's prime network time on all three networks -- an amount of time greater than all of access time under even the original Rule.

sold too many shows but that his children's access show, Story Theatre, should be disregarded because despite its universal critical acclaim, not enough stations bought it and it failed. While discussion of these matters is admittedly irrelevant, the fact that these appeals have reduced even parties who have sought wholly to avoid discussion of program types, let alone particular programs and producers, to defending their personal reputations is perhaps the most graphic and frightening illustration of why the Commission must under any circumstances refrain from the kind of regulation the new rules represent -- because they involve the same thing, as the waiver policy of the Commission already reflects.

The questions here presented for review need not and must not involve this Court in the same matters of subjective detail. The questions here presented simply require determination whether the Commission itself could permissibly have become so involved.

CONCLUSION

For the reasons stated above, the relief requested by Warner Bros., Inc., et al., should be denied. For the reasons stated in NAITPD's brief in Case No. 74-1168, the rules adopted by the Commission in the Report and Order under review should be set aside.

Respectfully submitted,

KATRINA RENOUF

Renouf, McKenna & Polivy
1532 Sixteenth Street, N. W.
Washington, D. C. 20036

April 1, 1974

APPENDIX A

AMERICAN CIVIL LIBERTIES UNION
22 East 40th Street
New York, New York 10016

S-1

January 12, 1973

In the Matter of

Consideration of the operation of, and possible changes in, the "prime time access rule", Section 73.658(k) of the Commission's Rules	:	Docket No. 19622

Doc

The American Civil Liberties Union strongly urges that the prime time access rule be continued. This rule contains the seeds of a new broadcasting harvest which undergirds the meaning of the First Amendment, and which should increase the number of program sources as well as the diversity of program content broadcast to the American public.

We ask that these comments not be considered our last word on the issue of networking and its impact on diversified programming. The ACLU is studying the issues involved in networking and may, on the basis of this study, wish to make further comments at a later time.

The Commission's adoption of the prime time access rule was the result of many years of investigation and analysis of the effects of the domination of the television program production market by the three major networks. The rationale for the adoption of the prime time access rule has been well stated by the Commission itself. In 1965 the Commission stated that:

> [N]etwork corporations, with the acquiescence of their affiliates have adopted and pursued practices in television procurement and

> production through which they have progressively achieved virtual domination of television program markets. The result is that the three national network corporations not only in large measure determine what the American people may see and hear during the hours when most Americans view television, but also would appear to have unnecessarily and unduly foreclosed access to other sources of programming.[1]

When the prime time access rule was adopted in 1970 the Commission asserted that:

> The public interest requires limitation on network control and an increase in the opportunity for development of truly independent sources of prime time programming. Existing practices and structure combined have centralized control and virtually eliminated sources of mass appeal programs competitive with network offerings in prime time.[2]

In affirming the Commission's action, the U.S. Court of Appeals for the Second Circuit noted:

> To argue that the freedom of networks to distribute and licensees to select programming is limited by the prime time access rule, and that the First Amendment is thereby violated, is to reverse the mandated priorities which subordinate these interests to the public's right of access. . . .The evidence demonstrates that despite the fairly wide range of choice available to licensees, they

---

1. Television Network Programming, FCC2d, 4 Pike & Fischer RR2d 1589 at 1591.

2. Network Television Broadcasting, 23 FCC2d 382, 894-95 (1970).

> have consistently decided to limit themselves to one program source during prime time. Thus, while the rule may well impose a very real constraint on licensees in that they will not be able to choose, for the specified time period, the programs which they might wish, as a practical matter the rule is designed to open up the media to those whom the First Amendment primarily protects - the general public.[3]

There is strong evidence that in the every-day, practical relationship between the network and licensee the dangers to access and diversity underscored by the Commission and the Court of Appeals are clearly present. The program originator, producer, director or writer, whose ideas and opinions do not satisfy those who decide -- and control -- network television programming, presently has few places to go. There is no real alternative outlet for his creative expression. With the development of alternate sources of prime time programming, the program creators might have such an alternative and the public might receive fresh and diversified treatment of important public issues.

Against this general background, the ACLU offers the following specific comments:

(1) We deplore the present FCC inquiry because it

---

3. Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 478 (2nd Cir. 1971).

is premature, and abandonment of the prime time access rule can stifle what promises to be a most fruitful experiment in the interests of diversity. Years of investigation went into the making of the rule, and yet it is being re-examined after it has been in effect only one year. (And during that year, it might be added, the rule was not in full effect since the provision excluding off-network material and movies previously shown in the market did not take effect until September 1972). Much more than a year will be needed for the development of creative approaches to the use of "cleared" time. Substantial financial investment in diversity programming will not be forthcoming in the absence of a strong, affirmative statement by the FCC that the rule is a long-term experiment and that the Commission will not tamper with it for some time. In the absence of such a guarantee, no producer is going to develop the business of programming for the access period, since full costs of production cannot be recovered from one showing of such programs. Conducting such premature imquiries as the present one can only encourage speculation that the rule may be rescinded and discourage

possible new program sources.

(2) If time is given for new approaches and new ideas in programming to emerge, and sufficient financial investment in programming for the cleared "access period" follows, it is fully possible that the prime time access rule will have the effect of injecting diversity into television broadcasting content. With this objective in mind, and in the interests of achieving diversity of information and opinion expressed over television, the ACLU endorses the suggestion (at page 29 of the Notice of Inquiry) that there be a requirement that some of the cleared "access period" time be devoted to "programming specifically designed to deal with the important problems in the station's community and coverage area as indicated by the licensee's survey to ascertain the needs, interests and problems of its community and area." Such programming could include both local and syndicated program material. In addition, stations should be encouraged to use this time for a diversity of programs in the public interest from a variety of sources. The "public interest" would here be defined in its broadest sense - to include cultural programming, new and creative entertainment programming and programming

to meet the particular tastes and interests of particular segments of the community.

(3) We oppose the FCC's practice of entertaining requests for and granting of waivers to the present rule. This necessarily involves the FCC in decision-making on the basis of program content, a dangerous exercise of governmental power in the always sensitive First Amendment area. In addition, the granting of waivers produces an effect contrary to the intent of the prime time access rule, since waivers favor off-network programming and reduce opportunities for new and diverse sources of programming.

In July 1972 the Commission granted the petition of Time-Life Films for waiver of the rule with reference to the series of six programs titled The Six Wives of Henry VIII, based on the general conclusion that this was a "distinctive and meritorious series."[4] Waiver was denied the Lassie program on the ground that the series was "fictionalized entertainment."[5] Lassie was distinguished from the program Wild Kingdom, which was

---

4. Memorandum Opinion and Order, FCC 72-573, released July 7, 1972.

5. Memorandum Opinion and Order, FCC 72-500, released July 10, 1972.

granted waiver, on the basis of its fictional nature as opposed to the non-fictional content of Wild Kingdom.[6] National Geographic was granted waiver on grounds similar to those of the Wild Kingdom decision.[7] Summer Olympics, on the other hand, was denied waiver.[8] In such decisions, the Commission is engaging in highly subjective evaluation of the content of broadcast material, contrary to both constitutional and statutory mandate.

In its petition for reconsideration of the Commission's Memorandum Opinion and Order granting the waiver petition of Time-Life Films, Westinghouse Broadcasting Company, Inc., noted that:

> Certain members of the Commission have expressed the view that waivers are necessary because of the fundamental unworkability of the rule. It is not the rule but the unpredictable and ambivalent attitude demonstrated by the Commission in administering it, which has led to the current state of affairs. While the Commission has stated at various times that it is committed to a "full and fair test of the rule," we cannot fail to take note of these unnecessary waivers; public speeches by members of the Commission expressing distate for network regulations of this type; and the premature announcement of plans to institute proceedings to rescind the

---

6. 33 FCC2d 583.

7. 37 FCC2d 933, October 26, 1972.

8. Memorandum Opinion and Order, FCC 72-440, reconsideration denied FCC 72-499, released July 10, 1972.

> rule as soon as possible. We must conclude that actions speak louder than words.[9]

The ACLU supports the suggestion of Westinghouse Broadcasting Company that the FCC issue a clear statement of policy that requests for waiver will not be entertained in the future.

If certain network programming is of such outstanding character to warrant pre-emption of regularly-scheduled programming, the network should pre-empt its own time rather than the time of its affiliates. If the Commission is going to entertain and grant waivers, however, the sole consideration should not be program content, but rather the effect of the waiver on opportunities for access and diversity.

Respectfully submitted,

Ms. Harriet F. Pilpel
Chairman
Communications Media Committee

---

9. Westinghouse Broadcasting Company, Inc., petition for reconsideration of the Commission's Memorandum Opinion and Order, FCC 72-573, released July 7, 1972.

CERTIFICATE OF SERVICE

I, June Holdridge, do hereby certify that copies of this Brief for Intervenor have been mailed first class, postage prepaid, this 1st day of April 1974 to:

Joseph A. Marino, Esquire
Associate General Counsel
Federal Communications Commission
Washington, D. C. 20554

J. Roger Wollenberg
Wilmer, Cutler & Pickering
Attorneys for Columbia
Broadcasting System, Inc.
1666 K Street, N. W.
Washington, D. C. 20006

Howard Monderer
National Broadcasting Company, Inc.
1800 K Street, N. W.
Washington, D. C. 20006

James A. McKenna, Jr.
McKenna & Wilkinson
Attorneys for American
Broadcasting Companies, Inc.
1150 Seventeenth St., N. W.
Washington, D. C. 20036

Richard L. Barovick
Hardee Barovick Konecky & Braun
Attorneys for Time-Life Films, Inc.
300 Park Avenue
New York, N. Y. 10022

Howard Shapiro, Esquire
Antitrust Division
Department of Justice
Washington, D. C. 20530

John D. Lane
Ramsey L. Woodworth
Hedrick & Lane
Attorneys for Westinghouse
1211 Connecticut Avenue, N. W.
Washington, D. C. 20036

Stuart Robinowitz
Paul, Weiss, Rifkind, Wharton
& Garrison, Attorneys for
Warner Bros., Inc., et al.
345 Park Avenue
New York, N. Y. 10022

Arthur Scheiner
Wilmer & Scheiner
Attorneys for MCA Inc.
2021 L Street, N. W.
Washington, D. C.

June Holdridge